No. 95-1100 (9)

In The

Supreme Court of the United States

October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

vs.

JILL BROWN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the United States Constitution impose liability on a County for a single hiring decision that comports with state law in every respect, when there is no evidence that the County's hiring practice in the past has resulted in the deprivation of a citizen's constitutional rights?

2. Does the hiring of a Reserve Deputy who has one misdemeanor conviction for assault and battery and traffic violations establish a causative link (amounting to deliberate indifference) between the decision to hire him and his subsequent use of force during the course of an arrest?

3. Are federalism concerns implicated by an opinion which imposes liability on a County for hiring a deputy with one misdemeanor assault and battery conviction and other minor offenses, when the State of Oklahoma proscribes only the hiring of individuals with felony records?

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OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals (App. 3a) is reported at 67 F.3d 1174. A superseded opinion of the court of appeals is reported at 53 F.3d 1410. The opinion of the district court (App. 30a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 23, 1995. Petitioner's Petition for Rehearing of Substituted Opinion and Petitioner's Suggestion for *En Banc* Consideration were denied by written order on November 29, 1995. (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides, in relevant part:

> . . . Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District

> of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Oklahoma Statute Title 70, § 3311 (West 1994) provides:

> No person shall be certified as a police or peace officer in this state unless the employing agency has reported to the Council that:
>
> a. the Oklahoma State Bureau of Investigation and the Federal Bureau of Investigation have reported that such person has no record of a conviction of a felony or crime involving moral turpitude,
>
> b. such person has undergone psychological evaluation. . . . The psychological instrument utilized shall be evaluated by a psychologist licensed by the State of Oklahoma, and the employing agency shall certify to the Council that the evaluation was conducted in accordance with this provision and that the employee/ applicant is suitable to serve as a peace officer in the State of Oklahoma. . . .

> This section shall also be applicable to all reserve peace officers in the State of Oklahoma, and
>
> c. such person possesses a high school diploma or a GED equivalency certificate. . . .

STATEMENT OF THE CASE

A. Facts of the Case

1. Stacy Burns' Background.

Stacy Burns graduated from high school in Durant, Oklahoma in May, 1988, approximately one month after his 18th birthday. (J.A. 85a).[1] For the next several months, Burns worked at Collier Brothers Furniture and Home Furniture Company and attended a college course at Southeastern State University. (J.A. 86a, 87a). By the beginning of 1989, Burns had enrolled full-time at the Norman, Oklahoma campus of the University of Oklahoma, in Clayton County. (J.A. 87a).

In September of 1989, while Burns was driving across the university campus, he came upon a fraternity pledge class. (J.A. 89a-90a). One of the members of the pledge class hit Burns' car. Burns stopped his car, got out, and confronted the students, several of whom began pushing Burns. He responded in kind. (J.A. 90a). There are no other details in the record regarding this fraternity fracas. The record does suggest, however, that police officers were called to the scene. (J.A. 43a, 81a, 100a). The record does not reveal whether members of the pledge class were charged with any criminal offense.

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1. Appendix to the Petition for Writ of Certiorari will be designated as (App. __). "J.A." refers to the Joint Appendix. References to the trial transcript will be designated as (Tr. __).

As a result of this encounter, Burns pleaded guilty to a number of misdemeanors, including assault and battery, public drunkenness, and possession of a false identification. (J.A. 41a-43a, 90a, 121a). Although he also pleaded guilty to several traffic offenses, it is unclear whether they were related to the campus incident or were the result of previous infractions. (J.A. 80a-83a, 88a-90a).

2. Bryan County's Hiring and Training of Stacy Burns.

In May, 1991, Burns formally applied for a Reserve Deputy position with Bryan County, Oklahoma. (J.A. 45a-46a). Burns' background did not disqualify him from law-enforcement employment,[2] therefore, the decision to hire him was left to the discretion of B.J. Moore, Bryan County's Sheriff. Moore had passing familiarity with Burns, who is the son of Moore's nephew. (J.A. 110a). Moore knew, for example, that Burns had received several traffic tickets and that Burns had been arrested for being in actual physical control of a motor vehicle while intoxicated. (J.A. 114a). Although he had obtained a copy of Burns' driving record and a report from the National Crime Information Center ("NCIC"), Moore did not know that Burns had pleaded guilty to assault and battery or public drunkenness. (J.A. 115a).

In accordance with state law, Burns enrolled in the Council on Law Enforcement Education and Training ("CLEET") program and began receiving instruction there on May 6, 1991. (J.A. 74a). In addition to this training, Burns rode with certified Peace Officer Earl Howell and Special Deputy Joe Calclazier as

2. Indeed, Otto Schweizer, Brown's expert witness on hiring standards, agreed that Bryan County complied with Oklahoma State statutes governing the hiring of Stacy Burns. (J.A. 47a-48a, 50a).

they carried out police business. (Tr. 579).[3] Calclazier and Howell gave Burns general instructions on law enforcement and particular instruction on how to detect drunk drivers, on proper procedures to conduct an investigatory stop, and on methods of placing a suspect under the officer's custody and control. (Tr. 580). In addition, Burns learned radio dispatch signals employed by the Bryan County dispatcher and studied law enforcement techniques provided by the Law Enforcement Training Network ("LETN"), a closed-circuit television program used as an instructional tool for law enforcement officers. (Tr. 579).

Sheriff Moore prohibited Burns from driving a vehicle or from carrying a revolver. (J.A. 95a, 117a-118a). In addition, Burns was not authorized to make forcible arrests unless he was accompanied by a supervising deputy. (J.A. 117a).

3. Todd Brown's Evasion of the Police Checkpoint: Deputy Sheriff Morrison and Reserve Deputy Burns' Pursuit of the Vehicle.

In the early morning hours of May 12, 1991, Todd Brown and his wife, Jill Brown, were traveling in her 1979 Chevrolet pickup truck from Grayson County, Texas to their home in Bryan County, Oklahoma. (Tr. 131). At 1:30 a.m., they crossed the Denison dam and entered Oklahoma, just north of the Texas-Oklahoma border. (Tr. 589). When Todd Brown saw he was approaching a police checkpoint near the high-crime area of Cartwright, Oklahoma, he abruptly reversed direction and headed south across the Denison dam back into Texas. (J.A. 111a). (Tr. 433, 590, 692). Although Todd Brown stated that he avoided the checkpoint because he had been "harassed" by police in the past, the record suggests he may have been worried

3. Schweizer agreed that the State of Oklahoma permits sheriff departments to allow reserve deputy sheriffs to accompany certified peace officers as they carry out law-enforcement duties. (J.A. 55a-56a).

that the police would discover the loaded rifle in the cab of the truck or the revolver concealed in a pocket of Jill Brown's front seat. (Tr. 48-49, 101, 134, 449).

Deputy Sheriffs Robert Morrison and Joe Calclazier and Reserve Deputy Stacy Burns were manning the police checkpoint when they observed Brown's vehicle make a U-turn and travel in the opposite direction. (Tr. 433, 590, 692). According to the officers, the Browns' truck fishtailed, its tires squealing, and left the checkpoint at a high rate of speed toward the Denison dam. (Tr. 433, 589-90, 692, 697). Todd Brown's testimony on the subject was purely subjective: he "didn't believe" his tires squealed; they "weren't intended to." (Tr. 135). He "didn't think" his pickup fishtailed, although he acknowledged that his front tires "kind of slide around some." (Tr. 136). With respect to the speed of his turn, he surmised that it "would be normal I would suppose." Did he leave at a high rate of speed? "I wouldn't have thought so. Pretty much just normal." (Tr. 135-36).

The contrary evidence — and the only evidence that explains the officers' pursuit and the participation of the Texas Highway Patrol — was direct, descriptive and definite. (Tr. 433, 589-90, 692, 697). There was direct evidence that Officer Morrison could not have caught the Browns without achieving speeds in excess of 100 miles per hour. (Tr. 435). Uncontradicted evidence established that Morrison and Burns informed the Bryan County dispatcher of their pursuit. (Tr. 442, 593). The record also establishes that Todd Brown proceeded nearly three-quarters of a mile after he first observed the pursuing patrol car's emergency lights. (Tr. 45, 141-42). The pursuit finally ended in Grayson County, Texas, approximately 4 miles south of the police checkpoint. (Tr. 45, 436-37, 610).

After Officer Morrison finally forced the Brown vehicle to

stop, Morrison and Burns placed their lives on the line. They emerged from their vehicle and ordered the occupants to get out of the truck. (Tr. 49, 441). Although Brown concedes that Officer Morrison may have ordered her to get out of the vehicle, she excuses any disobedience by claiming that, if Officer Morrison made such a command, she "didn't hear it." (Tr. 106).[4] Burns came around to the passenger door and ordered Brown to get out. (Tr. 625). At trial (if not on appeal) Brown conceded that she leaned forward, hands outstretched, when instructed by Burns to exit the truck. (Tr. 54, 595, 597, 627, 714).

Brown's forward lean, which occurred after the deputies had chased the truck four miles down a lonely road in the dead of night and after Jill Brown had twice refused to comply with direct orders, caused Reserve Deputy Burns to react with what all experts described as the "lowest level of force" an officer can employ short of purely oral persuasion. (Tr. 391-921, 505-06, 509-10). Burns seized Brown's arm at the wrist and elbow, extracted her from the vehicle, and placed her on the ground. (Tr. 595-97, 627). After a scuffle, Officer Morrison was finally able to place handcuffs on Todd Brown. (Tr. 442-43). The officers removed the loaded rifle and the concealed revolver from the truck after they had secured its occupants. (Tr. 48-49, 101, 449).

Jill Brown testified that she attempted to obey Burns' commands. She testified that, although she leaned forward, her hands outstretched, she was not "reaching" for anything at the time she was extracted from the vehicle. (Tr. 52, 54). As a result of the incident, Brown claims she suffered serious and disabling injuries to her knees. (Tr. 52-54, 261, 267-68).

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4. Todd Brown heard one of the officers say "Get out and put your hands on the hood." (Tr. 185). Officer Morrison testified that he ordered the occupants to get out of the truck. (Tr. 442-43). Stacy Burns testified that he ordered Jill Brown to get out of the truck. (Tr. 625).

B. Course and Disposition of Proceedings Below

Jill Brown commenced this suit under 42 U.S.C. § 1983 alleging that Bryan County, Oklahoma, Stacy Burns, Robert Morrison, and B.J. Moore were guilty of violating her constitutional rights. Brown alleged that Stacy Burns' actions in forcibly removing her from the pickup truck and handcuffing her during the investigatory stop amounted to excessive force that deprived her of rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff's Third Amended Complaint. (R. 648).

Brown alleged that Bryan County violated the Constitution either by: (1) hiring Burns, or (2) failing to adequately train Burns. The district court granted summary judgment in favor of Moore and Morrison, but denied Burns' and the County's motion for summary judgment. (J.A. 19a-29a). The case was tried to a jury. Bryan County moved for judgment as a matter of law at the close of Brown's case and renewed its motion at the close of all of the evidence. (J.A. 58a) (App. 30a). Both motions were denied. (J.A. 70a) (App. 35a). In addition to numerous other grounds, Bryan County objected to the court's charge on the basis that the evidence conclusively established compliance with applicable state law with regard to the hiring of Stacy Burns, that there can be no county liability under section 1983 for one isolated hiring decision, and that the jury interrogatories, which assumed Bryan County had adopted a "policy" of hiring Burns, was erroneous. (J.A. 128a-132a). Those objections were denied. (J.A. 132a).

The jury found that Stacy Burns arrested Jill Brown without probable cause; that Stacy Burns employed excessive force; that Stacy Burns falsely imprisoned Brown; and that Stacy Burns was not entitled to the defense of qualified immunity. (App. 38a-40a).

The jury also answered interrogatories concerning Bryan County. (App. 40a-41a). With respect to liability under section 1983, the jury found as follows:

> 1. . . . that the hiring policy of Bryan County ***in the case of Stacy Burns*** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff;
>
> 2. . . . that the training policy of Bryan County ***in the case of Stacy Burns*** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff.

(Emphasis added).

The jury assessed a total of $765,300 in actual damages; $87,500 in attorneys fees; and $20,000 in exemplary damages, for a total award of $872,500. (App. 41a-44a). Finding no evidence of loss of income in the past or loss of earning capacity in the future, the court rendered judgment against Brown for those amounts. (App. 34a). The district court entered judgment against Burns and the County for the $711,302 in actual damages; $87,500 in attorneys fees; and $20,000 in punitive damages. (App. 36a-37a). The district court did not award Brown any recovery against defendants Morrison and Moore. Burns and the County appealed the judgment. (R. 981).

There are two reported Fifth Circuit opinions. In the first opinion, which was superseded by the second, the court found "no evidence that Sheriff Moore did anything less than that which is required by [state] law" and concluded that "we do not find the training practices inadequate." *Brown v. Bryan County,*

OK, 53 F.3d 1410, 1425 (5th Cir. 1995). The court observed that Brown's failure to adduce evidence of other similar incidents or widespread misbehavior in the force precluded recovery under the inadequate training claim. *Id.* Nevertheless, the court found sufficient evidence to support what it variously termed Brown's "negligent-hiring," "inadequate screening" or "wrongful hiring" claim. According to the court, a section 1983 plaintiff need not prove similar incidents in order to recover against a county for its decision to hire an individual whose character is "deficient." *Id.* at 1421-1425.

On rehearing, the Fifth Circuit expunged its analysis of the "inadequate training" claim and affirmed the judgment solely on the basis that the county's "inadequate screening" of Reserve Deputy Burns was deliberately indifferent to the public's welfare and the direct cause of Brown's injuries. *Brown v. Bryan County, OK*, 67 F.3d 1174, 1185 (5th Cir. 1995). In its opinion, the Fifth Circuit acknowledged: "[i]t is certainly true that the Sheriff had conducted adequate background checks on other deputies and assured himself that they were certified before putting them on the street . . ." *Id.* at 1185 n. 22. The court also agreed that the law of the State of Oklahoma did not disqualify Stacy Burns from serving as a reserve deputy. *Id.* at 1184 n. 20. Nevertheless, the court wrote that Burns' background evidenced a "deficient character," a "propensity for violence," and a "disregard for the law," all of which precluded his employment. *Id.* The Fifth Circuit concluded that the County's "single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains." *Id.* at 1185.

Judge Emilio Garza dissented from the majority's opinion and judgment with respect to Bryan County. In Judge Emilio Garza's view, "*one* inadequate background investigation, even by a municipal policymaker, is not the 'unconstitutional

municipal policy' of which *Monell, Pembaur,* or *Tuttle* speaks." *Id.* at 1185 (internal citations omitted). Judge Emilio Garza articulated the basis for his dissent as follows:

> I do not agree, therefore, with the majority's implicit reasoning [explicitly stated in *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745 (5th Cir. 1993)] that any "distinction between policies that are themselves unconstitutional and those that cause constitutional violations" is "metaphysical." . . . The majority incorrectly, in my opinion, follows our opinion in *Gonzalez* in holding that Sheriff Moore's single decision created municipal liability, without reconciling the Supreme Court's instruction in *Tuttle* that a jury must have "considerably more proof than the single incident" before it can find causation. . . .
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> * * *
>
> I do not believe that the Court in *Pembaur* intended to suggest that *any* and *every* act by a final municipal policymaker constitutes, without more, "municipal policy." Sheriff Moore's deliberate indifference may have caused the constitutional violation in a "but for" sense, but it did not directly "order" or "authorize" the violation. Where the policymaker's decision does *not* directly "order" or "authorize" the constitutional violation, something more than a single decision is required in order to find that this decision in fact constitutes "municipal

> policy," such that we can hold the county liable. . . .

Judge Emilio Garza would have reversed the judgment as to Bryan County. *Id.* at 1186-87.

SUMMARY OF THE ARGUMENT

I. The Fifth Circuit's Opinion Contravenes *Monell.*

Of the numerous opinions issued by this Court since the landmark decision of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978), not one has questioned the fundamental tenet, borne of both statutory construction and adherence to principles of federalism, that section 1983 does not subject municipalities to *respondeat superior* liability for torts committed by their employees. If there is to be municipal liability under that section, it must occur one of two ways: (1) when the municipality is aware of, yet remains consciously indifferent to, a *pattern* of constitutional violations arising from the municipality's customary practices; or (2) when the municipality itself adopts a policy which either:

> a. directly causes the deprivation of a citizen's constitutional rights by *ordering* subordinates to violate the constitution, *see Pembaur*, 475 U.S. at 484; or
>
> b. inevitably causes the deprivation of constitutional rights, because it is clear to a moral certainty that execution of the policy will have that result. *Canton*, 489 U.S. at 390 n. 10.

Neither circumstance was raised by the evidence in this case.

First, Respondent has conceded the absence of any *pattern* of constitutional violations. Indeed, the record is clear that Jill Brown's claim is the *only* claim made against the Bryan County Sheriff's Department alleging *any* kind of police misconduct. The record is plain that "Sheriff Moore had conducted adequate background checks on other deputies and assured himself that they were certified before putting them on the street . . ." *Brown v. Bryan County, OK*, 67 F.3d at 1185.

Second, it is obvious that Bryan County did not *order* Stacy Burns to violate Jill Brown's constitutional rights. Therefore, Brown's claim of municipal liability rests on the premise that Bryan County adopted a *policy* which officially sanctioned hiring a person it knew, to a moral certainty, would deprive citizens of rights guaranteed by the United States Constitution. That premise is indefensible.

No one has ever questioned that Bryan County's hiring policy — whether with respect to Stacy Burns or any other peace officer or reserve deputy — conformed with the State of Oklahoma's minimum standards for employment. The state's statute prohibits hiring individuals with felony convictions, but there is no prohibition with regard to misdemeanors. (J.A. 47a-48a, 50a, 72a). In addition, there was no evidence whatsoever that hiring individuals with misdemeanor records resulted in the deprivation of *any* citizens' constitutional rights. It is not *per se unconstitutional* to hire such persons, because there is neither psychiatric nor anecdotal evidence that hiring an individual with *one* misdemeanor conviction for assault and battery would inevitably result in that individual's trampling on constitutional rights while employed as a reserve deputy.

In the absence of notice that compliance with the state's minimum hiring standards inevitably results in its employees' violation of constitutional rights, there is no showing of a

constitutionally-prohibited "policy" and thus no basis for recovery under section 1983. The lower court's relaxation of Respondent's burden, on the ground that such a hiring choice "cannot be tolerated," is tantamount to driving a stake into the heart of *Monell* by applying the doctrine of *respondeat superior* in the context of section 1983 claims against municipalities.

The lower court's opinion should therefore be reversed because it clearly rests on *respondeat superior* liability, in direct contravention of *Monell*.

II. Principles of Federalism Limit Municipal Liability for Singular Hiring Decision Which Comports With Constitutionally-Valid State Law.

"The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law administration. In this aspect, it has significance approximating constitutional dimension." *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting in part). No less than *Monroe*, this case turns on a distribution of power, pitting a state's authority to determine the eligibility of candidates for public employment, against the federal government's power to veto that determination, even when the determination itself does not offend any constitutional provision.

There is no State law precluding Bryan County from employing Stacy Burns; indeed, the State of Oklahoma vests in its counties the discretion to hire individuals who have had minor skirmishes with the law. Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). Where the hiring decision is not itself unconstitutional and no federal law governs the hiring decision,

concepts of federalism dictate that the State of Oklahoma's qualifying standards for police service should control. *See Rizzo v. Goode*, 423 U.S. 362, 378-380 (1976). In the absence of a pattern of constitutional deprivations arising from the adoption of a particular hiring standard, there is no constitutional basis for holding a County liable for personnel choices that conform to State requirements and which, in and of themselves, do not violate any constitutional provision or federal statute.

In this case, the Fifth Circuit crafted a minimum hiring standard — apparent nowhere in the United States Constitution — which a County cannot disturb without subjecting itself to liability under section 1983. The court's substitution of a federal hiring standard for Oklahoma's, without articulating any reasoned basis for such, will "engage the federal courts in an endless exercise of second-guessing municipal [hiring] programs" which, as this Court has recognized, "implicate[s] serious questions of federalism." *Canton v. Harris*, 489 U.S. 378, 392 (1989).

ARGUMENT

I.

THERE IS NO MUNICIPAL LIABILITY FOR A COUNTY'S HIRING DECISION, WHICH COMPORTS WITH VALID STATE LAW, WITHOUT EVIDENCE OF SIMILAR INCIDENTS OR AN AFFIRMATIVE LINK BETWEEN THE HIRING AND THE CONSTITUTIONAL DEPRIVATION.

It is well-settled that a municipality[5] may not be held liable under section 1983 solely because it employs an individual later

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5. Petitioner employs the term "municipality" as synonymous with the term "county."

found to have deprived a citizen of rights secured by the United States Constitution. *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 691 (1978). Only when a municipality's execution of a policy or custom inflicts a constitutional injury may the government as an entity be held responsible under section 1983. *Id.*

Respondent has conceded (as she must) the absence of any evidence of an offending "custom." Respondent's Brief in Opposition at 20. As for "policy," the record establishes conclusively that Bryan County's hiring conformed with the State of Oklahoma's overriding policy, defined by statute, regarding the employment of reserve deputies and peace officers. Okla. Stat. Ann. Tit. 70, § 3311(d)(2)(a) (West 1994). (J.A. 47a-48a, 50a, 112a). The state's policy, which no one has suggested offends the Constitution, has not been shown to give rise to a systematic deprivation of rights. Thus, the Fifth Circuit's holding imposes liability on Bryan County solely because it hired Stacy Burns.

1. Respondent Has Conceded Absence of "Custom" of Inadequate Hiring.

A municipal "custom" presupposes a "persistent and widespread practice" that has become "so permanent and well-settled as to constitute a "custom or usage with the force of law." *Monell*, 436 U.S. at 690, *quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167 (1970). A municipality thus becomes accountable for acquiescing in a "custom" only when it knowingly tolerates a pattern or practice of unconstitutional conduct. Evidence that one employee on one occasion violated one individual's constitutional rights does not constitute custom.

In the present case, the only "pattern" is of compliance with the law governing employment of law enforcement personnel. With the exception of the present case, the County had not received complaints alleging that an officer or reserve deputy

was abusive to, or utilized excessive force on, any citizen. (J.A. 112a). In fact, there had never been any complaint against the Bryan County Sheriff's department during Sheriff Moore's tenure. *Id.* With the sole exception of Respondent's complaints, Stacy Burns had never been accused of using excessive force. (Tr. 581). Under these circumstances, it is not surprising that Respondent would concede she has no evidence of an offensive custom. Respondent's Brief in Opposition at 20.

2. There Is No Evidence that Bryan County Adopted a "Policy" of Inadequate Screening.

A municipal "policy" is a "statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers." *Monell*, 436 U.S. at 690. This Court has observed that a deliberate single act by a nonpolicymaker does not constitute a policy sufficient to create municipal liability. *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985). Moreover, one may not infer a policy of inadequate police training based on evidence of a "single incident" of police misconduct. *Id.* As Justice Brennan noted in his concurring opinion in *Tuttle*: "[t]o infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*." 471 U.S. 808, 831 (1985). As a result of these concerns, the definition of "policymaker" is limited to those persons authorized to create *final* "municipal policy."

This Court initially examined the nature of a final policymaker in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).[6] In the context of a policymaker's single

6. In *Pembaur*, a County Prosecutor directed County Sheriffs to enter a (Cont'd)

unconstitutional act, Justice Brennan, writing for the plurality, observed that under appropriate conditions, official policy *may* be created when an authorized decisionmaker embarks upon a "course of action tailored to a particular situation and not intended to control decisions in later situations." *Id.* at 481; *see Owen v. City of Independence*, 445 U.S. 622 (1980) (city council's discharge of employee without pretermination hearing); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (city council's cancellation of concert license based on content of performance). The official with this final authority is one who not only has "discretion in the exercise of particular functions" but "must also be responsible for establishing *final* government policy respecting such activity before the municipality can be held liable." *Pembaur, supra* at 482-83; *see also Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985) (policymaking authority is more than having the final say-so, as a matter of practice).

Justice Brennan stressed that "[m]unicipal liability attaches only where the decisionmaker possesses *final* authority to establish municipal policy with respect to the action ordered. The fact that a particular official — even a policymaking official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur, supra* at 481-82 (emphasis added). It is clear from the opinion, however, that a "policymaker" may have final discretion within his sphere of operation, yet remain incapable of establishing final governmental policy. Justice Brennan could have been writing about this case when he set forth the following hypothetical:

(Cont'd)
medical center without the benefit of a search warrant in order to "get the witnesses." *Id.* at 473. The Court held that the municipality was liable under section 1983 based on the "final policymaker's" unconstitutional decision on that single occasion.

> . . . the County Sheriff may have the discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

Id. at 484 n. 12. In our case, Bryan County stipulated *only* that: "At all times relevant hereto, Defendant Moore was the policy maker for Bryan County regarding the Sheriff's Department." (J.A. 30a). Like the fictional sheriff in the first part of Justice Brennan's hypothetical, Bryan County's stipulation says nothing about the source of *final* policymaking authority with respect to employment practices. Moreover, there is no evidence that Bryan County's Board of Commissioners delegated to Sheriff Moore the power to establish final employment policy.

As a result, there is no basis for section 1983 liability against the County based on the adoption of a final hiring policy.

More importantly, the record here establishes that Sheriff Moore's hiring of Burns was in conformity with explicit employment policy promulgated by the State of Oklahoma. (J.A. 48a, 50a). Oklahoma law provides the minimum hiring standards for peace officers and reserve deputies.[7] Neither Sheriff Moore nor Bryan County had the authority to override those requirements. *See Auriemma v. Rice*, 957 F.2d 397, 400-01 (7th Cir. 1992) (superintendent's authority to make final decision on demotion did not create authority to make personnel "policy" because the superintendent had no power to countermand specific statute). Since Sheriff Moore's discretionary hiring act was in compliance with Oklahoma law, which is itself constitutional, that statute (and not Sheriff Moore's individual hiring decisions) represents the relevant hiring policy. *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (whether official has policymaking authority is question of state law)[8]; *Haworth v. Central Nat. Bank*, 769 P.2d 740, 743 (1989) ("Oklahoma statutes contain several provisions reflecting the state's direct intervention and control over law enforcement officers").

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7. Okla. Stat. Ann. Tit. 70, § 3311(d)(2)(a) (West 1994) provides that "[n]o person shall be certified as a police or peace officer in this state unless . . . such person has no record of a conviction of a felony or crime involving moral turpitude." In addition, Oklahoma provides for psychological testing and educational requirements (high school diploma or G.E.D. equivalency certificate). Okla. Stat. Ann. Tit. 70, § 3311(d)(2)(b)(c) (West 1994). "Any person found not to be suitable for employment or certification by the Council [on Law Enforcement Education and Training] shall not be employed . . ." Okla. Stat. Ann. Tit. 70, § 3311(d)(2)(b).

8. Although *Praprotnik* was a plurality decision, the Court adopted its analysis in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989) and expressly held that the question of who holds policymaking authority is one of state law properly determined by the District Court. *Id.* at 737.

3. Respondent Failed to Prove Causation for Inadequate Screening.

Consistent with its refusal to impose municipal liability based on *respondeat superior*, this Court has recognized that a section 1983 plaintiff must establish an "affirmative link" between the alleged "policy" and the claimed constitutional injury. *Tuttle*, 471 U.S. at 823. According to Respondent, the "affirmative link" here is the hiring of an individual with a "lengthy criminal record," which, she claims, evidences a deliberate indifference to the rights of those with whom Burns would come into contact. It is important, then, to review the constituent elements of Burns' record.

The offenses to which Burns pleaded guilty arose from a college fight. (J.A. 90a). Stacy Burns was 19 years old. The record reflects that he was confronted by a group from a fraternity pledge class, that the fight was initiated by one or more members of that class, and that a shoving match ensued. (J.A. 89a-90a). Apparently, the police were summoned and Burns was charged, but not convicted, of resisting arrest. (J.A. 43a, 81a, 100a). At the same time he pleaded guilty to misdemeanor assault and battery arising out of the fight, Burns entered plea agreements relating to traffic offenses, presentation of false identification, and for being in "Actual Physical Control" ("APC") of a motor vehicle while intoxicated. (J.A. 90a). *See Hoss v. State*, 738 P.2d 958 (Okla. Ct. App. 1987).[9]

There was no psychiatric or psychological testimony establishing that Burns' misdemeanor convictions for the college fight or driving offenses would directly lead to his using excessive force as a Reserve Deputy. Analysis of psychological test results is, in fact, utilized by the agency appointed by the

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9. Respondent's own expert characterizes misdemeanors as "minor" infractions. (Tr. 338).

State of Oklahoma to evaluate the fitness of Reserve Deputy candidates. The statute expressly provides that CLEET retains discretion to veto employment of "[a]ny person found not to be suitable for employment or certification by the Council . . ." Okla. Stat. Ann. Tit. 70 § 3311(d)(2)(b) (West 1994). There is no evidence that Burns' employment was precluded by CLEET.

Given the minor nature of Burns' offenses, Respondent has failed to demonstrate that Burns' background should have alerted Bryan County that he would, to a "moral certainty" exert more force than necessary when effecting an arrest. *See City of Canton v. Harris*, 489 U.S. 378, 390 n.10, 396 (1989)(municipal liability for inadequate training would require either pattern of similar incidents or proof that adoption of policy would, to a "moral certainty," result in violation of constitutional rights). Nothing in his background compels the conclusion that, despite training, supervision, psychological evaluations and testing, Burns would inevitably commit acts of unprovoked or excessive violence in contravention of the United States Constitution.

4. Respondent's Inadequate Hiring Claim Fails Under *City of Canton v. Harris*.

Those courts which have addressed claims of municipal liability based on inadequate hiring policies have followed the inadequate training paradigm of *City of Canton v. Harris*. Moreover, they have rejected the imposition of liability under circumstances where a municipality follows accepted hiring procedures of State or county law or relies on objectively reasonable criteria in reaching hiring decisions. *See Benavides v. County of Wilson*, 955 F.2d 968, 974-75 (5th Cir.), *cert. denied*, 506 U.S. 824 (1992) (reliance on fit-to-work letter without further investigation of mental disorders of officers not deliberately indifferent); *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085, 1096-97 (7th Cir. 1990) (police chief reliance on physician's return to work letter without obtaining

National Crime Information Center (NCIC) report or State criminal report not deliberately indifferent); *D.T. by M.T. v. Indep. School Dist. No. 16*, 894 F.2d 1176, 1179, 1193-94 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990) (no deliberate indifference when policymaker follows state hiring procedure and relies on state certification to ensure that teacher lacked criminal record); *J.H. By D.H. v. West Valley City*, 840 P.2d 115, 120-21 (Utah 1992) (no deliberate indifference where municipality followed normal hiring procedures).

In order for municipal liability to attach to a facially constitutional policy, the policymaker must have actual or constructive notice that the policy's application will inevitably and to a *moral certainty* lead to constitutional violations. *City of Canton, supra* at 390 n. 10. This is the touchstone of deliberate indifference. In addition, the policy must be so closely related to the ultimate injury that it can be said that the municipality actually caused the constitutional violation. *Id.* at 391. In this case, the evidence is clear that Bryan County, in hiring Burns, transgressed no State law, violated no federal statute, offended no constitutional provision.

In resolving a municipality's liability for inadequate training, this Court has suggested a pragmatic approach. The Court, for example, has explained that a claim of inadequate training will not succeed on a mere showing that an otherwise sound program has been negligently administered on one occasion. *City of Canton*, 489 U.S. at 391. It is also insufficient to show that an enhanced policy would have prevented the injury-causing conduct, because that is virtually self-evident. *Id.* Finally, the Court has observed that there are times that even adequately trained officers make mistakes; "the fact that they do says little about the training program or the legal basis for holding the city liable." *Id.*

These same principles should pertain here. *See Graham v. Sauk Prairie Police Comm'n, supra*, 915 F.2d at 1100-1103. Proof that Sheriff Moore deviated from otherwise

unimpeachable hiring practices does not remotely suggest deliberate indifference. As this Court stated in *Tuttle:*

> . . . where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Id. 471 U.S. at 824; *see also City of Canton v. Harris,* 489 U.S. at 432-33 (O'Connor, J., concurring). There is no reason to deviate from that standard in this case. Respondent has not shown that Bryan County adopted a "policy" of inadequate screening and, moreover, has failed to prove it was foreordained that a person with one misdemeanor conviction for assault and battery would violate a citizen's constitutional rights despite the training, supervision, psychological evaluation, and threat of termination that are part and parcel of the hiring decision itself.

5. The Fifth Circuit's Superseded Opinion Correctly Analyzed Respondent's Failure-to-Train Theory.

In her response to Bryan County's Petition for Writ of Certiorari, Respondent suggested that the District Court's judgment was supported by the jury's finding on inadequate training. Respondent's Brief in Opposition at 14-15. Respondent failed to mention, however, that the Fifth Circuit, in its prior opinion, concluded that her inadequate training claim failed as a matter of law. In reaching that result, the Fifth Circuit correctly reasoned that:

> A review of the record reveals that Sheriff Moore had enrolled Burns in the state-mandated Council on Law Enforcement Education and Training (CLEET) program

> while he worked as a Reserve Deputy. As there is no evidence that Sheriff Moore did anything less than that which is required by law, we do not find the training practices inadequate. *See Benavides v. County of Wilson*, 955 F.2d 968, 973 (5th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 79, 121 L. Ed. 2d 43 (1992). Although Mrs. Brown's expert urged that additional instructional programs were necessary to supplement the CLEET course and on-the-job training, there is no evidence suggesting that the training standard required by law was inadequate to enable the deputies to deal with "usual and recurring situations" typically faced by peace officers. *See id.* In addition, failure-to-train cases — unlike the negligent-hiring cases — *specifically* require more than a single instance of injury or an isolated case of one poorly trained employee before municipal liability can attach. . . . As Mrs. Brown claims that only Burns was inadequately trained and cites neither to other similar incidents nor widespread misbehavior, her claim alleging inadequate training must fail.

Brown v. Bryan County, OK, 53 F.3d 1410, 1424-25 (5th Cir. 1995) (*"Brown I"*), *superseded by, Brown v. Bryan County OK*, 67 F.3d 1174 (5th Cir. 1995)(*"Brown II"*). The court's prior analysis of inadequate training was correct, as demonstrated above; its error was in failing to apply that same analysis to Brown's "negligent-hiring" claims. Contrary to Brown's suggestion at pages 14-15 of her Brief in Opposition, the court's purging of that analysis in the second opinion does not establish

an independent ground for affirmance. *See Brown II, supra* at 1178 (declining to address Bryan County's challenge to inadequate training).

II.

MONELL'S REJECTION OF *RESPONDEAT SUPERIOR* LIABILITY EMBODIES THIS COURT'S CONCERN THAT PRINCIPLES OF FEDERALISM ENSURE A PROPER BALANCE BETWEEN HOLDING A MUNICIPALITY ACCOUNTABLE FOR VIOLATING CONSTITUTIONAL RIGHTS, WHILE PRESERVING STATES' AUTHORITY TO ADMINISTER THEIR OWN LAWS UNENCUMBERED BY EXCESSIVE FEDERAL-COURT INTERFERENCE.

Before anything else can be said about the interrelationship between section 1983 and principles of federalism, Petitioner hastens to acknowledge that the Civil Rights Act of 1871,[10] drastically "altered the relationship between the States and the Nation with respect to the protection of federally created civil rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Its draftsmen intended, and largely achieved, a profoundly enhanced federal power to protect citizens from unconstitutional action under color of state law. *Id.* It did *not* go so far, however, as to strip States of authority to promulgate perfectly constitutional legislation pertaining to the day-to-day administration of their own affairs. *Monell*, 436 U.S. at 693-95.

Proponents of the "Sherman Amendment" to the Civil Rights Act of 1871 wanted to make municipalities directly liable for mob violence against the enjoyment or exercise of federal

10. What is now section 1983 was enacted as section 1 of "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For Other Purposes," Act of April 20, 1871, ch. 22, 17 Stat. 13.

civil rights.[11] *Id.* at 691-92. Judgments in such actions were to be enforceable through a "lien . . . upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof." Cong Globe, 42d Cong, 1st Sess, 663, 755 (1871). The opposition to that amendment came not only from those hostile to the interposition of federal courts into previously sacrosanct State activity, but also from proponents of the original Civil Rights Act of 1866.

For example, Senator Lyman Trumbull, who was chairman of the Judiciary Committee and instrumental in passage of the 1866 Civil Rights Act, was one of the most outspoken critics of the proposal. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 456 (New York, Harper & Row 1988). The proposal, he urged, asserted "principles never before exercised on the part of the United States at any rate." Cong Globe, 42d Cong, 1st Sess, 758 (1871). Likewise, Representative Blair condemned the sweeping nature of the proposal:

> The proposition known as the Sherman amendment — and to that I shall confine myself in the remarks which I may address to the House — is entirely new. It is altogether without a precedent in this country. Congress has never asserted or attempted to assert, so far as I know, any such authority. That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone.

11. A thorough canvassing of the legislative history of the 1871 Act is contained in *Monell, supra*.

Id. Mr. Poland, House Manager of the Conference Committee Report, stated that: "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law." Cong Globe, 42d Cong, 1st Sess, 804 (1871).

Of course, the legislative history surrounding enactment of the Act of 1871 has been studied extensively by this Court in prior opinions. *Monroe v. Pape*, 365 U.S. 167 (1961); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Monell v. Dept. of Social Services of New York*, 436 U.S. 658 (1978); *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). It is offered here to emphasize three points which are critical to the disposition of this case.

First, in the extraordinary climate engendered by the North's triumph over the South in the aftermath of the Civil War — at a time of vastly expanded federal prerogative *vis a vis* state sovereignty — the Reconstruction-era Congress recognized that its reach did not exceed the limits imposed by the United States Constitution as an institutional restraint on Congress' authority to impose upon the States extra-constitutional obligations. Indeed, Congressional recognition of the wisdom of limiting raw federal power evidenced loyalty to the Founding Fathers' plans for the polity.

The Founding Fathers expressed concern that "ambitious encroachments of the federal government on the authority of State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm." *The Federalist No. 46*, p. 298 (C. Rossiter ed. 1961). At least in part, the Founders' struggle to preserve a national government presupposed fidelity to States' retention of control over their own internal affairs.

Second, in areas (as here) where State laws are not themselves unconstitutional, the bulwark of federalism promotes, rather than hinders, accountability of the State government to its citizens. Recently, Justice Kennedy observed that if encroachment on the balance between the national and State power were left unchecked, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *United States v. Lopez*, 514 U.S. __, __, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring).

In our case, there is no constitutional impediment to Oklahoma's decision to vest its counties with authority to employ whom it chooses as reserve deputies, within express limits provided by statute. That policy, in and of itself, is not the proper subject of federal court intervention. In a very similar context, this Court has rejected the proposition that federal courts have authority to order local government agencies to implement procedures, acceptable to the court, for handling citizens' complaints about the conduct of their law enforcement agencies. *Rizzo, supra*, 423 U.S. at 380.

If a federal court may legitimately conclude that Stacy Burns' misdemeanors "preclude" his employment notwithstanding State law to the contrary, why should it not be entitled to forbid the hiring of *any* applicant with a history of misdemeanor arrests?" Or, as Respondent suggests, why should it not have the power also to preclude Bryan County from hiring applicants who profess ideas the court finds inappropriate? Respondent's Brief in Opposition at 11.

Such decisions are left to the States precisely because it is "essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external

interference, except so far as plainly provided by the Constitution of the United States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), *quoting Taylor v. Beckham*, 178 U.S. 548, 570-571 (1900).

Third, the expanded scope of federal oversight of State personnel decisions envisioned by the lower court would be virtually impossible to administer. Under the lower court's reasoning, federal juries and judges would become super-legislators, empowered to craft minimum qualifications for State employees that exceed those enacted by State legislatures. What had been an essentially *political* decision regarding a State's allocation of resources for the selection, training and evaluation of law-enforcement personnel, would devolve into *ad hoc* determinations by courts that certain yet-to-be-identified classes of applicants are "unfit" for service.

How are States to predict which components of a police applicant's prior background would survive a federal court's litmus test for service? The Fifth Circuit's opinion provides no guidance. We are told that a "propensity for violence" and "disregard for the law" bar law enforcement service, but where is the limiting principle in the "standard"? *Brown II*, *supra* at 1183. Federalism concerns are greatest when a federal court's intervention in State affairs can neither be justified as a matter of constitutional principle nor limited by defined boundaries. *See United States v. Lopez*, 514 U.S. at __, 115 S. Ct. at 1626, *quoting The Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961) ("[t]he powers delegated by the proposed Constitutional to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

This third point is especially troublesome precisely because it foreshadows a wholly inefficient federal oversight over State administration of basic law enforcement. *See The Federalist No.*

46, p. 298 (C. Rossiter ed. 1961) (". . . it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered"). As noted above, this is not the first time this Court has faced the question. In *Rizzo*, the district court's injunction was held to violate principles of federalism precisely because it interfered with "the internal disciplinary affairs of the state agency." 423 U.S. at 380. In the case *sub judice*, the effect of the lower court's holding is to place a shadow injunction on the State of Oklahoma's statutory qualifications for reserve deputy and peace officer employment, which countermands Oklahoma's ability to exercise its own judgment in an area to which it lay claim "by right of history and expertise." *United States v. Lopez*, *supra*, 514 U.S. at __, 115 S. Ct. at 1641 (Kennedy, J., concurring).

By substituting its own minimum standards for those enacted by the State of Oklahoma, the Fifth Circuit has placed itself in the position of "final policymaker" with respect to hiring decisions. Such a result signals a drastic departure from this Court's settled jurisprudence rejecting *respondeat superior* liability for local government units and would precipitate federal court intervention in the day-to-day promulgation and enforcement of State policy.

This Court has appropriately answered these questions in a manner that is consistent with principles of federalism. When it is established that the State's policies are unconstitutional in and of themselves, or (if constitutional) would inevitably result in constitutional deprivations, then the authority of the federal court, through the remedial mechanism of section 1983, is appropriately enlisted. Absent those conditions, federal intervention is an unwarranted intrusion into the prerogative of agencies to exercise the discretionary authority entrusted to them by the State.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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